APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15029

D.C. Docket No. 02-20424-CV-DLG

WILLIE R. FLINT, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

versus

ABB, INC., f.k.a. ABB Power,
T&D CO., INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 21, 2003)

Before BARKETT and KRAVITCH, Circuit Judges, and

FULLAM*, District Judge.

KRAVITCH, Circuit Judge:

This case presents two questions. The first is whether § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), authorizes an ERISA plan beneficiary to receive interest on reinstated benefits when the employee-benefit plan (the "Plan") does not explicitly provide for interest on reinstated benefits. The second question is whether plaintiff-appellant Willie R. Flint has stated a claim under § 502(a)(3)(B) of ERISA, 29 U.S.C. § 1132(a)(3)(B), that would allow him to recover interest on reinstated benefits.

I. BACKGROUND

Flint is a former employee of defendant-appellee ABB, Inc. After an automobile accident in March 1998, Flint applied for and received disability benefits under ABB's Plan. He had been receiving disability benefits for approximately three years when ABB, through its claims processor, Kemper National Services ("Kemper"), received information from Flint's attending physician indicating that Flint was no longer totally disabled. Under the terms of the Plan, ABB could stop paying disability benefits if Flint either (1) was "no longer totally disabled" *or* (2) failed to "give proof of [his] continued disability."

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* Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Given the Plan's provisions, ABB investigated whether to continue paying Flint's disability benefits. It requested an independent labor-market survey, which concluded that "several appropriate positions were found" in which Flint could work. Consequently, ABB informed Flint on June 19, 2001 that he was no longer "totally disabled" within the meaning of the Plan and that his disability benefits would terminate on July 1, 2001. June 19, 2001 was the first time that Kemper informed Flint that his case was under review.

Flint wrote a letter dated July 2, 2001 to appeal the disability termination. On August 31, 2001, ABB through Kemper, denied Flint's appeal. In October 2001, Flint again appealed the termination of benefits and this time provided Kemper with additional medical information. Flint also asked Kemper to give him a filing extension so that he could have more time to furnish additional medical information to support his claim for reinstatement. He asked for this extension because his doctor was unable to see him within the appeals period. In November 2001, Kemper acknowledged receiving the second appeal and granted Flint an extension in which to provide additional medical information supporting his claim. Flint provided the additional medical information, and shortly thereafter, Kemper reinstated Flint's benefits and made the reinstatement retroactive to July 1, 2001. Kemper issued a check for these benefits on December 28, 2001. Flint has conceded that the appeals process, which ultimately led to the reinstatement of his benefits, did not violate the Plan, the ERISA statute, or any Department of Labor regulations.

Flint brought suit against ABB in February 2002, maintaining that he is entitled to interest payments on the retroactive Plan benefits. Flint characterized these retroactive benefits as "delayed benefits." Flint conceded that "[t]he Plan documents are silent regarding the payment of interest on Delayed Benefits"; nevertheless, he claimed that § 502(a)(1)(B) and § 502(a)(3)(B) of ERISA allow plaintiffs to recover accrued interest on reinstated benefits, even when an employer's plan is silent on the issue.

ABB moved to dismiss Flint's claim pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that Flint had not stated a claim upon which relief could be granted. The district court granted the motion, concluding that Flint had not alleged facts that would entitle him to relief under either § 501(a)(1)(B) or § 502(a)(3) of ERISA. The court held that § 501(a)(1)(B) does not create an implied right to recover accrued interest for reinstated payments, but instead allows recovery only for "benefits specified in the plan." It also held that § 502(a)(3)'s catch-all provision concerning "appropriate equitable relief" might allow plaintiffs to recover accrued interest for reinstated benefits - but only when benefits are unreasonably delayed or wrongfully withheld. The court concluded that Flint had not pleaded facts demonstrating that ABB had unreasonably delayed or wrongfully withheld his benefits. Accordingly, it dismissed Flint's claim without prejudice and allowed Flint to amend his complaint, which he did; the district court concluded, however, that Flint's amended complaint had not alleged facts that, if proven, would entitle him to relief under §

502(a)(3)(B)'s catch-all provision. Flint also requested a declaration that he and other plan members had present and future rights to receive interest on reinstated benefits, but the district court denied this relief as well.

II STANDARD OF REVIEW

We review de novo the dismissal of a complaint for failure to state a claim, accepting all allegations in the complaint as true and construing facts in a light most favorable to the plaintiff. *Harper v. Thomas*, 988 F.2d 101, 103 (11th Cir. 1993). A court cannot use Federal Rule of Civil Procedure 12(b)(6) to dismiss a complaint for failure to state a claim "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

III. ANALYSIS

We must decide whether Flint has stated a claim under either § 502(a)(1)(B) or § 502 (a)(3)(B) that entitles him to interest on his reinstated benefits.

A. Whether Interest for Reinstated Benefits Is an Implied Term of § 502(a)(1)(B)

Section 502(a)(1)(B) of ERISA provides that a participant or beneficiary of an employee-welfare benefit plan may bring

a civil action

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

29 U.S.C. § 1132(a)(1)(B).

Flint argues that accrued interest payments constitute "benefits due to him under the terms of his plan" within the meaning of § 502(a)(1)(B), reasoning that paying interest on reinstated benefits is an implied term of the Plan. The basis for this argument is that (1) ERISA plans are contracts and (2) the default rule in contract law is that a party is entitled to receive interest on unpaid obligations to pay money.[1] According to this theory, ABB breached the contract by delaying the payment of benefits and consequently, should pay Flint interest to compensate him for the time value of the reinstated benefits.

We are reluctant to infer an implied cause of action from § 502(a)(1)(B). The Supreme Court has "observed repeatedly that

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[1] Flint cites the Supreme Court's opinion in *Curtis v. Innerarity*, 6 How. 146 (1848), which states, "Every one who contracts to pay money on a certain day knows, that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said, that such is the implied contract of the parties." *Id.* at 154.

ERISA is a "comprehensive and reticulated statute," the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980))). The Court has "emphasized [its] unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).

Furthermore, no circuit has recognized a claim for interest under § 502(a)(1)(B) of ERISA. The only circuit to address the issue directly has ruled that if interest is not a benefit expressly provided for in the employee-benefit plan, it cannot be recovered under § 502(a)(1)(B), because "only benefits specified in the plan can be recovered in a suit under section 502(a)(1)(B)." *Clair v. Harris Trust & Sav. Bank*,, 190 F.3d 495, 497 (7th Cir. 1999) (Posner, J.). Given the Supreme Court's unwillingness to allow implied causes of action under ERISA and the fact that, like the plan in *Clair*, the Plan here does not provide for such interest, we follow *Clair* and conclude that Flint's claim under § 502(a)(1)(B) fails.

B. Whether Flint Has Stated a Claim Under § 502(a)(3)(B) that Would Allow Him to Recover Interest on Reinstated

Benefits

Flint argues that § 502(a)(3)(B) of ERISA supplies another basis for recovering accrued interest for reinstated benefits. Section 502(a)(3) provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) *to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan* . . . .

29 U.S.C. § 1132(a)(3) (emphasis added).

Flint maintains that awarding accrued interest on reinstated benefits falls into the category of "appropriate equitable relief." ABB responds, correctly, that interest on money past due under a contract is a classic form of compensatory damages and, as such, does not qualify as "equitable relief" under § 502(a)(3)(B). *See Knudson*, 534 U.S. at 210 (explaining that suits for money damages are "the classic form of *legal* relief" and, therefore, are not recoverable under § 502(a)(3)(B)).

Flint, however, proposes an alternative theory for the causative event that gives rise to ABB's alleged duty to pay for the time value of the "delayed benefits." Flint argues that ABB violated its fiduciary duties to him when it initially terminated his benefits and that ABB should therefore disgorge the benefit

derived from this breach. Under this theory, the case is one of wrongful enrichment - the wrong being the breach of a fiduciary duty and the enrichment being the time value of the money that ABB should have paid to Flint between July 1 and December 28, 2001. Because courts of equity traditionally ordered fiduciaries to disgorge wrongful enrichments, Flint maintains that the relief he seeks is "appropriate equitable relief" under § 502(a)(3)(B).

Several circuit courts of appeals - speaking in terms of a fiduciary's "unjust enrichment" (rather than its "wrongful enrichment"[2]) - have held that interest payments on delayed benefits may, in some circumstances, constitute "other equitable relief" within the meaning of § 502(a)(3)(B). *See, e.g., Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 229-30 (2d Cir. 2002); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 749-50 (8th Cir. 2001); *Clair*, 190 F.3d at 498-99; *Fotta v. Trustees of*

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[2] An unjust enrichment occurs when the defendant holds something that belongs to the plaintiff or receives, without legal cause, a transfer of goods or services from the plaintiff. The law of unjust enrichment is concerned solely with enrichments that are unjust *independently* of wrongs and contracts. When the plaintiff relies on a breach of contract to supply the "unjustness" of the defendant's holdings, the right on which he or she relies arises from the breach of contract, not from an unjust enrichment; analogously, when the plaintiff relies on a wrong to supply the "unjust factor," the causative event is a wrongful enrichment rather than an unjust enrichment. *See* Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 Texas L. Rev. 1767, 1783 (2001).

the United Mine Workers of Am., 165 F.3d 209, 213 (3d Cir. 1998). Most of these cases, however, were decided before *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), in which the Supreme Court's interpretation of "appropriate equitable relief" was more narrow than the interpretations found in previous decisions by the circuit courts of appeals. The Court instructed that, in determining whether relief "is legal or equitable in a particular case (and hence whether it is authorized by § 502(a)(3)) remains dependent on the nature of the relief sought," and the Court resisted plaintiffs' attempt to characterize their claim for enforcement of a reimbursement provision of an ERISA plan as one for equitable restitution. *Id.* The Court's decision in *Knudson*, therefore, raises the question whether § 502(a)(3) ever allows an award of interest for delayed benefits or whether such a claim is an impermissible attempt to dress an essentially legal claim in the language of equity.

We need not, however, decide that issue in this case. Even assuming that § 502(a)(3)(B) could be the basis for recovering interest, Flint's amended complaint does not state a claim upon which relief can be granted. Flint maintains that ABB breached it fiduciary duty by terminating his benefits without first requesting or allowing him a reasonable opportunity to provide evidence of continued disability before making the determination to discontinue benefits. Three circumstances described in the pleadings, however, lead us to reject Flint's argument. First, the Plan provided that ABB could stop paying disability benefits when Flint was "no longer disabled," and,

here, Flint's own doctor had advised ABB that Flint was no longer completely disabled. Furthermore, an independent report recommended several jobs that Flint could perform within the limitations prescribed by Flint's doctor. Second, the Plan specifies that "[i]n no case will benefits be paid by this Plan . . . for any period on or after the date [the employee] fail[s] to furnish satisfactory proof [of disability] as required by the insurance company . . . ." Therefore, the Plan entitled ABB to terminate benefits when Flint failed to provide proof of his continuing disability by July 1, 2001.[3] Furthermore, given that ERISA employers owe a fiduciary duty to all of their covered employees, ABB had a duty to protect and preserve benefit funds according to the provisions of the Plans and the ERISA statute. Finally, Flint has not pleaded facts that would show that ABB unduly delayed the ERISA appeals process or wrongfully refused to reinstate his benefits retroactively at the end of the process. *Cf. Clair*, 190 F.3d at 499 (holding that plaintiff was barred from collecting accrued interest when employer disbursed benefits according to the procedure and the time period outlined in the employee-benefit plan). To the contrary, Flint's own allegations make clear that the appeals

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[3] Flint's best argument to the contrary is that once ABB sent the June 19th notice, it voluntarily assumed the obligation to give Flint a reasonable time period in which to provide additional medical information. Yet, as the district court noted, neither the Plan nor ERISA regulations impose an advanced-warning requirement, and, given the Supreme Court's reluctance to find implied duties under ERISA, we decline to infer such an implied duty here.

process functioned according to Plan provisions and ERISA regulations - and that this process led to the retroactive reinstatement of benefits within six months of the initial adverse decision. Accordingly, Flint has not stated a claim under § 503(a)(3)(B).

IV CONCLUSION

For the reasons stated, we AFFIRM the decision of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 02-20424-CIV-GRAHAM

WILLIE R. FLINT, on behalf
of himself and all persons
similarly situated,

Plaintiff,

vs.

ABB, INC. f/k/a ABB POWER
T&D COMPANY, INC.,

Defendant.
_____/

OPINION AND ORDER

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss the First Amended Class Action Complaint (D.E. 23).

THE COURT has considered the motion, the pertinent portions of the record, and is otherwise duly advised in the premises.

I. BACKGROUND

This is a purported class action suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*, for accrued interest on "delayed benefits" wherein the benefits at issue have been reinstated and the subject employee benefit plan did not expressly provide for interest on "delayed benefits."

Plaintiff Willie R. Flint ("Plaintiff" or "Flint"), is a participant and beneficiary of certain employee welfare benefit and pension benefit plans sponsored and/or administered by the Defendant ABB, Inc. or its predecessor ABB Power ("ABB"). In his Amended Complaint, Plaintiff alleges that his benefits under ABB's long-term disability plan ("LTD Plan" or "Plan") were terminated in violation of the LTD Plan, and that although ABB later reinstated said benefits retroactive to the day of termination, he has been denied his "full and complete" benefits because ABB did not pay him accrued interest on the reinstated sum.

The relevant allegations are as follows. In or about March, 1998, Plaintiff became totally disabled as a result of an automobile accident. In due course Flint applied for, and ABB granted, benefits under the LTD Plan. The Plan states that in no case would benefits be paid "for any period on or after the date you fail to furnish satisfactory proof . . . of the continuance of total disability." D.E. 18, Amended Complaint, Ex. C, at 4.

Approximately three years after Plaintiff became disabled, the Plan's claims administrator, Kemper National Services ("Kemper"), obtained information from Plaintiff's attending physician indicating that Plaintiff had the "physical capacity to perform work activities" and was no longer totally disabled. D.E. 18, Ex. A, at 1.

Consequently, on June 19, 2001, Kemper notified Plaintiff in writing that he no longer met the LTD Plan's definition of total disability, and that Kemper would discontinue his benefits after June 30, 2001. *See Id.* Prior to the June 19, 2001, notice, Kemper did not inform Plaintiff that his case was under review.

In his Amended Complaint, Plaintiff now alleges, in conclusory fashion, that a few months following the initial denial of benefits, Plaintiff provided additional medical information, after which the disability benefits were ultimately reinstated on or about December 1, 2001, retroactive to July 1, 2001. However, despite Plaintiff's demands, the reinstated sum did not include any amount for interest. *Id.*[1]

Plaintiff concedes, and the Amended Complaint does not otherwise allege, that the processing of his appeal (which

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[1] Plaintiff conceded in his initial Complaint that "[t]he Plan documents are silent regarding the payment of interest on Delayed Benefits." D.E. 1, Complaint, ¶22. Although this allegation is omitted from the Amended Complaint, nowhere does the Amended Complaint allege that the Plan expressly provided for the payment of interest on "delayed benefits."

successfully resulted in the reinstatement of his benefits) was handled in a timely manner and within the time frame established by Department of Labor regulations. *See, e.g.*, Plaintiff's Opp. Mem. at 12.

Thus, Plaintiff appears to allege that he should be awarded interest on his "delayed benefits," not because of any delay in the appeal process, but because Plaintiff claims his benefits should have not been discontinued in the first instance. Plaintiff alleges that had he been given advance warning and an opportunity to submit additional information *before* his benefits were discontinued, his benefits would not have been "delayed." Plaintiff alleges that this failure to provide advance warning or an opportunity to submit further information before his benefits were terminated violated the terms of the LTD Plan.

Plaintiff also alleges that the termination notice provided to him was deficient in that it did not adequately explain the reasons for the termination of his benefits. Further, Plaintiff alleges that, in violation of ERISA and/or the terms of the LTD Plan, Plaintiff was provided with the incorrect Plan documents. *See* Amended Complaint, ¶¶18-29.

Based on the alleged violations as set forth above, Plaintiff alleges that he should be entitled to accrued interest on the "delayed benefits" already provided to him.

II. STANDARD OF REVIEW

It is axiomatic that "a complaint shall not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove a set of facts which will entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). In ruling on a motion to dismiss, a federal court must view the complaint in the light most favorable to plaintiff and accept its allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Beck v. Deloitte & Touche*, 144 F.3d 732 (11th Cir. 1998). Thus, in the context of a motion to dismiss, the issue is not whether plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. DISCUSSION

A. Count I

Count I arises under §502(a)(3)(B) of ERISA, 29 U.S.C. §1132(a)(3)(B), which provided in pertinent part that a civil action may be brought:

> by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to *obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.*

29 U.S.C. §1132(a)(3) (emphasis supplied). Under this count, Plaintiff contends that interest is due him as a matter of equity, in order to prevent the Plan's unjust enrichment.

In order for Plaintiff to state a claim for interest on "delayed benefits," Plaintiff must adequately allege facts supporting a claim that Kemper violated either a specific ERISA requirement or the terms of the LTD Plan itself, and the alleged violation must be of the kind which gives rise to a claim for equitable relief. 29 U.S.C. §1132(a)(3)(b).

In this Court's Order dated April 10, 2002, granting Defendants' motion to dismiss with leave to amend, the Court noted the following pleading deficiencies with respect to Plaintiff's claim for interest on delayed benefits:

> [T]he Complaint makes no allegations and fails to state any facts indicating that Plaintiff's benefits were wrongfully withheld and "delayed" in violation of any provision of the Plan or ERISA. The Complaint does not allege that benefits were not paid in a timely manner under ERISA regulations. Nor does it allege that benefits were delayed in violation of the LTD Plan's appeal procedures. Nor does the Complaint allege any facts which may indicate that the processing of his claim for disability benefits was otherwise unreasonable, or in violation of ERISA or the terms of the Plan. Without more, the Court must conclude that as pled, the Complaint fails to allege facts which make out a Section

502(a)(3)(B) claim for accrued interest with respect to "delayed benefits."

See April 10, 2002 Order, D.E. 16, at 8-9.

In an attempt to correct the prior pleading deficiencies identified by this Court, Plaintiff alleges in his Amended Complaint that Defendants violated either ERISA or the Plan by (1) failing to provide advance warning and an opportunity to submit additional medical information in support of his continuing disability, prior to terminating his benefits; (2) providing inadequate notice of the specific reasons for the termination of his benefits; and (3) providing Plaintiff with the incorrect Plan documents. *See* Amended Complaint, ¶¶18-29.

In response to this Court's prior Order, Plaintiff argues that the timeliness of the process through which his benefits were reinstated is irrelevant to the issue of his entitlement to the equitable relief of interest on "delayed benefits." Plaintiff's Opposition Brief, D.E. 32, at 12. The Court will consider each of these allegations, and the purported violations of ERISA or the Plan, in turn.

1. **Whether the "Advance Warning" Allegations Support Plaintiff's Claim for Equitable Relief**

Plaintiff primarily contends that he is entitled to interest on his "delayed benefits" because Kemper allegedly violated the procedure outlined in the LTD Plan, by not allowing or

requesting Plaintiff to substantiate his disability *before* Kemper discontinued his benefits in June, 2001. Specifically, Plaintiff singles out the following provision from the LTD Plan:

> In no case will benefits be paid by this Plan –
>
> (1) For any period on or after the date you fail to furnish satisfactory proof as required by the insurance company, of the continuance of total disability.

Amended Complaint, Ex. C. Thus, as the plain terms of this provision makes clear, the failure to furnish satisfactory proof of disability may constitute grounds for the denial of benefits.

Plaintiff, however, offers a far broader interpretation of this provision, and submits that it imposes an obligation on Kemper to request and allow plan participants to furnish additional information *before* benefits can be discontinued. Thus, in the instant case, Plaintiff contends that prior to discontinuing his benefits, this provision required Kemper to allow Plaintiff to furnish *further* information to refute or contradict the information Kemper had already obtained (as referenced in Exhibit A to the Amended Complaint).

The court finds that the provision's plain language does not support Plaintiff's strained interpretation. The Plan provision at issue here merely states that *if* Kemper were to ask Plaintiff to furnish satisfactory proof of the continuance of his total disability, and Plaintiff failed to provide it, the failure to

provide benefits shall constitute grounds for the termination of benefits.

Accordingly, because Plaintiff has not properly alleged that the failure to provide "advance warning" or an opportunity to submit additional information prior to the termination of benefits violated any provision o ERISA or the LTD Plan, such allegations cannot state a claim for accrued interest as equitable relief under Section 502(a)(3)(B).

2. Whether the "Inadequate Notice" Allegations Support Plaintiff's Claim for Equitable Relief

Plaintiff next contends that he is entitled to accrued interest on his "delayed benefits" because Kemper's June 19, 2001, 3-page letter to Plaintiff inadequately explained the reasons for the termination of his benefits, in violation of ERISA regulations.

The pertinent ERISA regulation obliges Kemper to provide Plaintiff with a written notification of any adverse benefit determination, and the notification must set forth, in a manner calculated to be understood by the claimant:

> (i) The specific reason or reasons for the adverse determination; (ii) Reference to the specific plan provisions on which the determination is based; (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why

> such material or information is necessary; (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review.

29 C.F.R. §2560.503-1(g).

The Court finds that Plaintiff's conclusory assertion that the June 19, 2001 notification letter was inadequate is contradicted by the letter itself, which is attached as Exhibit A to the First Amended Complaint. By its terms, the notification letter provided the specific reasons for the adverse determination, made reference to the specific Plan provision on which the denial was based, explained how Plaintiff might perfect his claim, and described the Plan's review procedures and the time limits applicable to such procedures. *See* Amended Complaint, Ex. A, at 1-3.

Further, Plaintiff's reliance on *Halpin v. W.W. Granger, Inc.*, 962 F.2d 685 (7th Cir. 1992), is inapposite. In *Halpin*, the Seventh Circuit held that the denial letter at issue in that case did not comply with the notice regulations because the letter did not state the specific reasons for the denial. *Id.*, 962 F.2d at 693. In the instant case, Plaintiff's denial letter, attached as Exhibit A to the First Amended Complaint, unambiguously states the reasons for the discontinuance of benefits.

In support of his argument that the denial letter did not comply with ERISA regulations, Plaintiff appears to resort to additional factual issues that are not pled and/or referenced in the First Amended Complaint. These issues are improperly before the Court, and will not be considered herein.

Accordingly, because the terms of Exhibit A plainly contradict Plaintiff's conclusory allegations, and reveal that Plaintiff was provided with the specific reason for the termination of benefits and the Plan provision relied upon, the Court finds that Plaintiff has failed to state a claim for interest on "delayed benefits" on the ground that the notification letter was in violation of ERISA regulations or the terms of the Plan. *See generally Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97 (5th Cir. 1974) (ruling that on motion to dismiss, conclusory allegations are not admitted as true when such conclusions are contradicted by facts disclosed by document appended to complaint, and holding that dismissal is appropriate if appended document reveals facts which foreclose recovery as matter of law).

3. Whether Plaintiff's Allegations Concerning the Plan Documents Support A Claim for Equitable Relief

Finally, Plaintiff maintains that he is entitled to interest on delayed benefits because Kemper violated the Plan and/or ERISA by providing his attorney with the documents attached as Exhibit B, which Plaintiff claims are "on their face erroneous, self-contradictory, and state that they are not the

actual plan documents," that they "contain not one, but two LTD plans," and that Plaintiff "cannot be sure if any of the documents provided by [Kemper] are the actual plan documents." Amended Complaint, ¶ 22.

The Court finds, however, that there simply is no question about the applicable Plan document, which Plaintiff himself has attached as Exhibit C to the First Amended Complaint, and has relied on in advancing his claims. Further, it is difficult to see how any failure to provide Pan documents *after* benefits were denied can support Plaintiff's claim for interest on delayed benefits, where the argument concerning delay is that the *initial* denial itself should have never been made. Accordingly, such allegations fail to state a claim for interest as equitable relief under Section 502(a)(3)(B).

4. Whether The Timeliness of the Appeal Process Is a Relevant Issue With Regard to Stating a Claim for Delayed Benefits

Plaintiff argues that under the Second Circuit's decision in *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2nd Cir. 2002), the timeliness of the appeals process is irrelevant to the issue of stating a claim for interest on delayed benefits, and that it is sufficient to merely plead that benefits were "unjustly delayed."

In *Dunnigan*, the Second Circuit held that a five-year delay in the payment of benefits, if unjustified, constituted a breach

of fiduciary duty which entitled a beneficiary to receive interest on his benefits. *See Id.*, F.3d at 229-230. The complaint in *Dunnigan* specifically pled that the denial of the participant's benefits application and appeal occurred after the expiration "of the time periods specified by the Secretary of Labor's regulations." *Id.* at 226. *See also Clair v. Harris Trust & Savings Bank*, 190 F.3d 495, 499 (7th Cir. 1999) (dismissing as "bordering on the frivolous" a claim of untimeliness where benefit appeals were processed within the time frame established by regulation).

Unlike the situation in *Dunnigan*, which involved a Plaintiff who was forced to wait 60 months for her benefits, there is no allegation here that Plaintiff's appeal was not processed in a timely manner or in violation of ERISA regulations. Rather, Plaintiff's own allegations make clear that the appeal process functioned precisely as intended, and successfully resulted in the retroactive reinstatement of Plaintiff's benefits, within six months of the initial adverse decision.

The Court finds the timeliness of the appeal is relevant to whether Plaintiff has stated a claim for accrued interest on "delayed benefits." Again, as with the initial Complaint, the Court finds that the Amended Complaint fails to state any facts supporting a claim that benefits were "delayed" in violation of any provision of the Plan or ERISA. The Amended Complaint does not allege that benefits were not paid in a timely manner under ERISA regulations. Nor does it allege that benefits were delayed in violation of the LTD Plan's appeal procedures.

As such, the Court must conclude that the Amended Complaint fails to allege a Section 502(a)(3)(B) claim, as Plaintiff has not adequately alleged that Kemper violated either a specific ERISA requirement or the terms of the LTD Plan itself, such that the alleged violation would give rise to an equitable claim for interest on "delayed benefits."[2]

5. Equitable remedies

In the Amended Complaint, Plaintiff seeks, *inter alia*, a declaratory judgment that all payments by the Defendants to members of the class for delayed benefits must include interest, an injunction requiring the Defendant to pay class members interest on delayed benefits, the imposition of a constructive trust in favor of the class members upon all Plan assets equal to the interest on delayed benefits, and equitable restitution to the class members in the amount of interest on the delayed benefits. *See* Amended Complaint, at ¶42.

The Supreme Court has held that the term "equitable relief" in Section 502(a)(3) must refer to "those categories of relief that were typically available in equity," and not whatever relief a court of equity might be empowered to provide in a particular case. *Mertens v. Hewitt Associates*, 508 U.S. 248, 256, 113

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[2] In addition to naming the ABB LTD Plan as a defendant, Plaintiff has named numerous other plans in his Amended Complaint. Plaintiff failed to allege any claim for benefits under any of these other plans. Accordingly, Court I must be dismissed in its entirety as to all Defendants.

S.Ct. 2063, 124 L.Ed.2d 161 (1993); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 712-713, L.Ed.2d 635 (2002). Defendants argue that the relief sought in Count I – accrued interest for delayed benefits – is not the type of "equitable relief" typically available in equity under the circumstances presented in this case.

However, having determined, as set forth above, that the Amended Complaint fails to allege facts that Defendants violated any term of the Plan or ERISA in support of his claim for interest on delayed benefits, the Court need not reach this issue.

B. Count II

Plaintiff concedes that the Court previously ruled that he had failed to state a cause of action under § 502(a)(1)(B), and merely repleads Count II in the Amended Complaint to preserve the issue for appellate review. Accordingly, for the reasons set forth in the Court's April 10, 2002, Order, Count II must also be dismissed.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Motion to Dismiss the First Amended Complaint is hereby **GRANTED**. The First Amended Complaint is hereby **DISMISSED, with prejudice.**

It is further

ORDERED AND ADJUDGED that this case is CLOSED for administrative purposes, and any pending motions are denied as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of August, 2002.

/S/
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Gary Gerrard, Esq.
Mark J. Heise, Esq.
Lori A. Brown, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 02-20424-CIV-GRAHAM

WILLIE R. FLINT, on behalf
of himself and all persons
similarly situated,

Plaintiff,

vs.

ABB, INC. f/k/a ABB POWER
T&D COMPANY, INC.,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss the Complaint (D.E. 5).

THE COURT has considered the motion, the pertinent portions of the record, and is otherwise duly advised in the premises.

I. BACKGROUND

Plaintiff, a former employee of Defendant ABB, Inc. ("ABB") or its predecessor, ABB Power, asserts that he is owed accrued interest for alleged "delayed benefits" already paid to him under Defendant's Long Term Disability Plan ("LTD Plan" or "Plan"). Plaintiff contends that Defendant's failure to pay interest on "delayed benefits" violates the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001, *et seq.*

The Complaint alleges that Plaintiff applied for and received disability benefits under ABB's Plan after he was involved in an automobile accident on or about March, 1998. Several years later, on June 19, 2001, Defendant ABB, through its claims processor, Kemper National Services ("Kemper"), informed Plaintiff that he was no longer "totally disabled" within the meaning of the LTD Plan and that his disability benefits were being terminated effective July 1, 2001.

Plaintiff appealed the disability determination by letter dated July 2, 2001. On August 31, 2001, Defendant, through its claims processor, denied Plaintiff's appeal.

On October 29, 2001, Plaintiff again appealed the termination of disability benefits, and at that time provided certain additional medical information to Kemper. At the same time, Plaintiff requested that Kemper grant Plaintiff an extension of time to furnish further additional medical

information to support his claim for reinstatement of benefits. Plaintiff asked for this extension because Plaintiff's doctor refused to see him within the appeal period.

On November 12, 2001, Kemper acknowledged receipt of the second appeal, and confirmed an extension for Plaintiff to provide additional medical information to support his claim. At some unspecified time thereafter, Plaintiff provided additional medical information to support his claim.

On December 20, 2001, shortly after Plaintiff provided additional medical information, Kemper notified Plaintiff that his benefits were being reinstated, retroactive to July 1, 2001, and issued a check for such benefits on December 28, 2001.

Plaintiff maintains that he is entitled to interest payments on the retroactive benefits he received under the LTD Plan, benefits which Plaintiff characterizes as "delayed benefits." Plaintiff concedes in the Complaint, however, that "[t]he Plan documents are silent regarding the payment of interest on Delayed Benefits." Complaint, ¶ 22.

II. STANDARD OF REVIEW

It is axiomatic that "a complaint shall not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove a set of facts which will entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). In ruling on a motion to dismiss, a federal court must

view the complaint in the light most favorable to plaintiff and accept its allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Beck v. Deloitte & Touche*, 144 F.3d 732 (11th Cir. 1998). Thus, in the context of a motion to dismiss, the issue is not whether plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. DISCUSSION

Plaintiff asserts that his claim for accrued interest is cognizable under either Section 502(a)(1)(B) or Section 502(a)(3)(B) of ERISA. Defendants argue that Plaintiff's claim for interest fails to state a cause of action under either section, and that even if a stand-alone claim for accrued interest was actionable, the Complaint fails to allege that Plaintiff's benefits were withheld or delayed in violation of any specific provision of the LTD Plan or ERISA.

A. Whether Interest Payments for "Delayed Benefits" May be Recovered Under Section 502(a)(1)(B).

Section 502(a)(1)(B) of ERISA provides in pertinent part that a civil action may be brought by a participant or beneficiary of an employee welfare benefit plan:

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of

the plan.

29 U.S.C. §1132(a)(1)(B). Thus, Section 502(a)(1)(B) permits a claim for benefits due under the LTD Plan.

Plaintiff argues that interest payments should be viewed as necessary to receive "full and complete benefits" under the Plan, and maintains that the Court should recognize that employee welfare benefit plans impliedly contain interest payment provisions for "delayed benefits." Plaintiff, however, concedes that Defendant ABB's Plan documents are silent regarding the issue of interest payments.

No circuit has recognized a claim for interest under Section 502(a)(1)(B) of ERISA. The only circuit that has directly addressed the issue has ruled that if interest is not a benefit expressly provided for in the plan, it cannot be recovered in an action under Section 502(a)(1)(B) because "only benefits specified in the plan can be recovered in a suit under Section 502(a)(1)(B)." *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999), *cert denied*, 528 U.S. 1157 (2000).

Indeed, as Chief Judge Posner reasoned in *Clair*, the "argument that benefits include interest on benefits when benefits are paid late is inconsistent with the principle that benefits payable under an ERISA plan are limited to the benefits specified in the plan." *Id.* (citing *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 105 S.Ct. 3085, 3091 (1985)).

In the instant case, Plaintiff concedes that the LTD Plan does not specify interest benefits. Accordingly, the Complaint fails to state a cause of action under ERISA section 502(a)(1)(B).

B. Whether Interest Payments For "Delayed Benefits" Are Recoverable Under Section 502(a)(3)(B).

Although Plaintiff only asserts a one-count complaint for interest payments on "delayed benefits" and does not specify the statutory basis for his claim in Count I, Plaintiff appears to allege that his claim for interest payments is also cognizable under another ERISA provision. Section 502(a)(3), which provides in pertinent part that a civil action may be brought:

> by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

20 U.S.C. §1132(a)(3) (emphasis supplied). The Supreme Court has interpreted this section as a "catch-all" provision that acts as "a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996).

The parties dispute whether the interest Plaintiff seeks constitutes impermissible extracontractual money damages, or appropriate "equitable relief" within the meaning of Section 502(a)(3)(B). Defendants point to the Supreme Court's recent decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S.Ct. 708 (2002) for the proposition that "equitable relief" excludes all forms of monetary relief, including accrued interest. However, in *Knudson*, the Court did not specifically address the issue of accrued interest, but rather merely held that an insurance company's claim for reimbursement of benefits already paid to a beneficiary was a claim for money damages, and could not be sustained as a claim for "equitable relief" under ERISA. *See Knudson*, 122 S.Ct. at 713.

However, although the Eleventh Circuit has not addressed this issue of accrued interest on delayed benefits under ERISA, nearly all of the circuit courts to consider the issue have concluded that interest payments on delayed benefits may constitute "other equitable relief" within the meaning of Section 502(a)(3)(B). *See, e.g., Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223, 229-230 (2nd Cir. 2002); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 749-50 (8th Cir. 2001); *Clair*, 190 F.3d at 498-499; *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 213 (3rd Cir. 1998).

As the Second Circuit recently noted in *Dunnigan*, "the mere fact that money is sought does not necessarily classify the relief as damages, rather than extracontractual relief. Equity sometimes awards monetary relief." *Dunnigan*, 277 F.3d at 229

(citing *Clair*, 190 F.3d at 498). In the context of delayed benefits, accrued interest may constitute "appropriate equitable relief", as such relief may be necessary to prevent the unjust enrichment of the plan, *e.g.*, by virtue of the plan's retention of the time value of benefits that should have been otherwise paid at some earlier time. *See Id.*; *Jackson*, 245 F.3d at 750; *Clair*, 190 F.3d at 498-499; *Fotta*, 165 F.3d at 212. The rationale of the circuit courts, as set forth above, is consistent with the Supreme Court's recent decision in *Knudson*, which in any event did not address the issue of whether accrued interest may be available under ERISA as an equitable make-whole remedy to prevent unjust enrichment. Therefore, the Court concludes that Section 502(a)(3)(B) is an appropriate vehicle for Plaintiff to state a claim for accrued interest on delayed benefits.

The Court's inquiry does not end there, for the Court must still determine whether, in the context of a motion to dismiss, Plaintiff has alleged facts which make out a Section 502(a)(3)(B) claim for accrued interest as "delayed benefits." *See, e.g., Dunnigan*, 277 F.3d at 231. (Plaintiff may recover accrued interest by reason of unreasonable delay in payment of benefits); *Jackson*, 245 F.3d at 750 (accrued interest is available if benefits were wrongfully withheld or delayed in violation of the terms of the plan or ERISA); *Clair*, 190 F.3d at 498-99 (same).

In the instant case, the Complaint makes no allegations and fails to state any facts indicating that Plaintiff's benefits were wrongfully withheld and "delayed" in violation of any provision

of the Plan or ERISA. The Complaint does not allege that benefits were not paid in a timely manner under ERISA regulations. Nor does it allege that benefits were delayed in violation of the LTD Plan's appeal procedures. Nor does the Complaint allege any facts which may indicate that the processing of his claim for disability benefits was otherwise unreasonable, or in violation of ERISA or the terms of the Plan. Without more, the Court must conclude that as pled, the Complaint fails to allege facts which make out a Section 502(a)(3)(B) claim for accrued interest with respect to "delayed benefits."

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss (D.E. 5) is **GRANTED**. The Complaint is **DISMISSED without prejudice**. It is further

ORDERED AND ADJUDGED that if deemed appropriate, Plaintiff must file an Amended Complaint within ten (10) days of the date of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of April, 2002.

/S/

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Garber
Mark J. Heise, Esq.
Lori A. Brown, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15029-DD

WILLIE R. FLINT, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,

versus

ABB, INC., f.k.a. ABB Power,
et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed August 27, 2003)

BEFORE: BARKETT and KRAVITCH, Circuit Judges, and FULLAM*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/S/ PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE